Supreme Court, U.S.
FILED

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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CAROLYN JOYCE WINDHAM

Petitioner,

vs.

THE CITY OF LOWELL, ARKANSAS; WILLIAM JAMES KRUSE, Police Officer, Individually and in his Official Capacity;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in an action involving a police pursuit, the applicable culpability standard is one of "deliberate indifference" or is one of "shocking to the conscience" as held by the District Court in this case and affirmed by the Eighth Circuit.

II. Whether, in an action involving a police pursuit, the actions of a police officer rise to the level of culpability necessary to sustain a substantive Due Process rights violation where a reasonable officer knew or should have known he was violating the law and placing citizens at risk of harm.

LIST OF PARTIES

The caption in this case contains the names of all parties.

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Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit is an unpublished opinion. It is reprinted in the Appendix hereto, pp. 2-5.

The memorandum order of the United States District Court for the Western District of Arkansas, Fayetteville Division, granting summary judgment in this case has not been reported. It is reprinted in the Appendix hereto, pp. 8-28.

Statement of Jurisdiction

On August 7, 1996, Petitioner brought suit against the Respondents in the United States District Court for the Western District of Arkansas, Fayetteville Division, alleging a federal question under 42 U.S.C.A. § 1983 and Due Process violations under the Fourteenth Amendment to the United States Constitution.

On April 30, 1997, the District Court granted Respondents' motion for summary judgment. See App., p.6. On May 27, 1997, Petitioner appealed the District Court's Order to the United States Court of Appeals for the Eighth Circuit.

On January 5, 1998, the Eighth Circuit issued their opinion affirming the District Court's Order. See App., p.2.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C.A. § 1254(1) and 28 U.S.C.A. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

Fourteenth Amendment To The United States Constitution, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. 42 § 1983 Civil Action For Deprivation Of Rights.

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Arkansas Code Annotated
§ 12-75-113(d)

When responding to an emergency, the designated emergency vehicle shall have flashing lights or rotating beacon activated and must be equipped with and operating a siren device.

Arkansas Code Annotated
§ 27-51-104(a) & (b)(1)

(a) It shall be unlawful for any person to drive or operate any vehicle in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise, or in such a manner as to evidence a failure to maintain proper control on the public thoroughfares or private property in the State of Arkansas.

(b) It shall be unlawful for any person to operate or drive any vehicle on the public thoroughfares or private property in the State of Arkansas in violation of the following prohibited acts:

(1) Improper or unsafe lane changes on public roadways.

STATEMENT OF THE CASE

A. Facts Giving Rise to this Case

This case involves a collision between an unmarked police car driven by Lowell, Arkansas Police Officer William Kruse (hereinafter "Respondent Kruse"), and the Petitioner, Carolyn Joyce Windham (hereinafter "Windham").

While on duty on April 13, 1995, at approximately 2 p.m., David Harmon, then the Lowell Chief of Police, clocked a vehicle driven by Keith Allen Mey travelling south on Highway 71B at 76 miles-per-hour in a 45 miles-per-hour zone. On the date of the head-on collision involving Respondent Kruse and Windham, there were five police officers employed by the City of Lowell, three included Chief Harmon, Officer Jerry Bowman, and Respondent Kruse. Upon instigating the "strictly misdemeanor" pursuit of Mey, Chief Harmon activated the emergency lights and

siren on his marked police vehicle. At 2:04 p.m. Chief Harmon contacted the Benton County, Arkansas Sheriff's Department and Officer Bowman to notify them of his position, but at no time did Chief Harmon request assistance from Respondent Kruse who was in plain clothes that day working at the station on warrants.

Upon hearing the radio transmission, Respondent Kruse left his desk and ran to his unmarked police car and immediately drove to assist Chief Harmon and Officer Bowman in the pursuit of Mey. Respondent Kruse never notified Chief Harmon of his intention to become part of the pursuit of Mey. During Respondent Kruse's attempt to catch up with the pursuing vehicles, Respondent Kruse became aware that the Springdale, Arkansas Police had become involved in the matter as the Mey vehicle sped into the city limits of Springdale, Arkansas. It was at that time that Respondent Kruse momentarily decided to end his response. However, Respondent Kruse changed his mind shortly thereafter and renewed his high-speed pursuit, travelling

south on Highway 71B. In the area concerned, Highway 71B has five total lanes, two northbound lanes, two southbound lanes, and a center turn lane. At the time of the accident, the traffic on Highway 71B was quite heavy, with vehicles occupying both the northbound and southbound lanes.

Respondent Kruse continued his pursuit south on Highway 71B, travelling at speeds estimated at being between 60 and 70 miles-per-hour in the posted 50 miles-per-hour speed zone. At almost the same time, Windham's vehicle had come to a complete and full stop in the center turning lane of 71B, facing north at the intersection of 71B and Wagon Wheel Road. Windham, an innocent bystander and not involved in the police chase, was attempting to turn west onto Wagon Wheel Road, with her left turn signal on as she was waiting for traffic to clear. The area of 71B where the collision occurred has been described as "hilly" with a grade of approximately two degrees on an incline toward the north for approximately nine hundred feet north to the

hillcrest.

Immediately before entering the intersection of Wagon Wheel Road and 71B, Respondent Kruse had entered the center turning lane at a high rate of speed attempting to weave his way through the traffic that occupied all northbound and southbound lanes. Witnesses contend that Respondent Kruse, in his unmarked police car, did not have his emergency siren on at the time of the collision with Windham.

Upon entering the intersection travelling at approximately 70 miles-per-hour, Respondent Kruse's vehicle collided head-on with the Windham vehicle. The accident occurred inside the city limits of Springdale, Arkansas. Windham sought the services of a collision consultant who, after an intensive investigation, concluded that Respondent Kruse was operating his vehicle in an extremely unsafe and reckless manner. After the accident, Windham was immediately transported to Northwest Arkansas Medical Center where she remained from April 13,

1995 until May 12, 1995, incurring approximately One Hundred and Twenty Thousand Dollars ($120,000.00) in medical bills.

B. Procedural History

On August 7, 1996, Windham filed suit in the United States District Court for the Western District of Arkansas, Fayetteville Division, alleging a Federal question in that the actions of Respondent Kruse and the other Respondent, the City of Lowell, violated her Due Process rights arising under 42 U.S.C.A. § 1983 and the 14th Amendment to the United States Constitution. Respondents thereafter filed a Motion for Summary Judgment based on the theory that the actions of Respondents did not rise to the level necessary to sustain an action under 42 U.S.C A. § 1983. The Western District Court granted the Respondents' Motion for Summary Judgment.

On December 23, 1997, Windham filed a notice of appeal from the District Court's Order granting Respondents' Motion for Summary Judgment. In an opinion issued

January 5, 1998, the Eighth Circuit Court of Appeals affirmed the District Court's Order holding that gross negligence does not violate due process.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review Is Warranted Because The Opinion By The Eighth Circuit Conflicts With The Opinions Of Those Of The Third, Fourth, Sixth, Ninth, And Tenth Circuits Concerning The Applicable Standard Of Care Necessary To Sustain A Substantive Due Process Rights Violation In Relation To Police Officers In Police Pursuits.

To prevail under § 1983, the Petitioner is first required to show that the law enforcement officer was acting under color of state law and deprived her of "rights, privileges, or immunities secured by the Constitution or laws of the United States." Daniels v. Williams, 474 U.S. 327, 330, 106 S.Ct. 662, 664 (1986). Since Respondent Kruse was on duty the day of the accident, there is no dispute that he was acting under "color of state law" at the time of the collision with Windham. At issue here is whether Respondent Kruse and the Respondent, City of Lowell,

engaged in conduct that deprived Windham of a federally protected right.

After Windham establishes that Respondent Kruse was acting under color of state law, Windham must next allege facts, that if proven, establish that she has sustained a constitutional injury. The circuits are currently split as to what level of culpability must be reached in order to sustain an allegation of violation of an individual's constitutional rights. This Court has held that where a law enforcement official or municipality's actions comprise mere negligence, no substantive due process violation occurs. Daniels, 474 U.S. at 328. However, in Daniels this Court did not state whether something less than intentional conduct such as recklessness or gross negligence would be enough to sustain an allegation of constitutional injury.

While this Court has not set-forth definite guidelines, six circuit courts have addressed the issue of § 1983 culpability where police officers have been involved in high speed pursuits. The Third Circuit Court of Appeals adopted

the "shocking to the conscience" standard in Fagan v. City of Vineland, 22 F.3d 1296 (1994) (en banc). In 1991, the Fourth Circuit Court of Appeals also applied the standard of "shocking to the conscience" in Temkin v. Frederick County Commissioners, 945 F.2d 716, 723 (1991), cert. denied, 502 U.S. 1095 (1992). The Sixth Circuit Court of Appeals held in Jones v. Sherrill, 827 F.2d 1102 (1987), that gross negligence or outrageous conduct would be sufficient in some circumstances to maintain a § 1983 allegation. Jones, 827 F.2d at 1106. To sustain a claim of constitutional injury where the injuries stem from a police officer involved in a high-speed pursuit, the Ninth Circuit Court of Appeals has ruled that the actions of the officer must be done in deliberate indifference or reckless disregard for the individual's rights to personal security. Lewis v Sacramento County, 98 F.3d 434 (9th Cir. 1996), cert. granted 1997. See also Wood v. Ostrander, 851 F.2d 1212, 1214-1215 (9th Cir.1988).

The Court of Appeals for the Tenth Circuit ruled in

1992 that the level of harm necessary to support a similar claim under § 1983 must allege facts that could lead a court to conclude the officer acted with reckless disregard. Finally, the Eighth Circuit Court of Appeals has concluded that gross negligence would not be sufficient to carry a § 1983 claim, but the Eighth Circuit has not stated what standard should be applied. Roach v. City of Frederick, 882 F.2d 294, 297 (1989). Windham asserts that this Court should adopt one clear, objective standard of liability that would balance an individual's federally protected due process rights and the public's vested interest in effective and conscientious enforcement of the law. The need for a concrete § 1983 standard is evidenced by the confusion which lower courts have faced in attaching liability in cases involving law enforcement officers that cause harm to individuals while acting in their official capacity. It is Windham's assertion that the standard applied to this case by the Western District Court of Arkansas of "shocking to the conscience" is too high a standard to reach and that this Court should give

guidance to the lower courts by adopting a standard of deliberate indifference or reckless disregard in situations similar to the instant case where innocent bystanders are injured by police officers engaged in high-speed pursuits.

The seminal case on § 1983 violations by a law enforcement officer is Rochin v. California, 342 U.S. 165 (1952). In Rochin, law enforcement officers in California forced an individual to swallow an emetic in order to make him regurgitate incriminating evidence. Id, at 166. This Court held that the extraction of the evidence by the police officers violated the substantive component of the Due Process Clause because it "shocked the conscience" and was of such magnitude to "offend even hardened senses." Id. at 172.

Although many courts have looked to Rochin for direction in determining § 1983 claims, Rochin stands for the proposition that where a police officer's actions are "shocking to the conscience" the Court will find culpability. However, the Rochin Court did not examine what minimum level

would need to be proved to sustain such a claim. This Court has never held that only conduct which "shocks the conscience" is required to prove a § 1983 allegation. Id. at 169-174. Further, while Rochin has been often quoted in cases regarding the use of force against individuals by police officials, the case has also been cited as being flawed for being too subjective. See Rochin v. California, 342 U.S. 165, 172 (1952) (referring to the "shock the conscience" test as "indefinite and vague.") Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (asserting that "with a 'shocks the conscience' test of constitutionality, individuals must guess what is the law and guess what a majority of nine judges will believe fair and reasonable.") Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3rd Cir.1994) (declaring that the "shocks the conscience" standard is "amorphous and imprecise"). There has also been concern, expressed by this Court, that the "shocks the conscience" test overlooks objectivity by focusing on the subjective state of mind of the law enforcement agent. Graham v. Connor, 490 U.S. 386, 387

(1989). Therefore, courts have struggled with defining exactly what level of "danger" is necessary to state a claim against a law enforcement agent who causes harm to an individual. This dilemma is exasperated where the injury involves a high-speed pursuit.

Windham respectfully urges this Court to adopt a more objective standard in accordance with the substantive component of the Due Process Clause: that police officers have a responsibility to conduct themselves in a sensible, not capricious manner. Daniels v. Williams, 748 F.2d at 331 (recognizing that police officers involved in chase circumstances have a duty not to act in an arbitrary manner). Notably, the deliberate indifference standard is the test this Court currently uses to determine the liabilities of municipalities in § 1983 cases; once a prima facie constitutional injury is stated, the appellant must prove that the municipality's policy governing the actions of the officer involved would amount to "deliberate indifference to the rights of persons with whom the police come into contact."

City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). The deliberate indifference standard also precludes the subjective requirement of an individual showing that it was the intent of the officer to do harm in that given situation.

This Court has ruled that the meaning of "deliberate indifference" requires more than negligence, but less than deliberate action taken for the sole purpose of causing harm in that instance. Farmer v. Brennan, 114 S.Ct 1970, 1978 (1994) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986). Accordingly, the deliberate indifference standard would require that facts be alleged that, if proven, would show that the law enforcement officer acted with deliberate indifference if he knew of a risk that was so great that it was highly probable that harm would follow and he still proceeded with unreasonable disregard of the probable harm. This same level of culpability was applied by the Tenth Circuit Court of Appeals in Medina v. City and County of Denver, 960 F.2d 1493, 1496 (1992). To establish such

deliberate indifference, this Court should require an individual to state facts that would tend to prove that the police officer acted with actual knowledge of a substantial risk, or at minimum, knowledge of facts that would indicate this risk to a reasonable person. Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2nd Cir.1981).

Appropriately, when the "deliberate indifference" standard is applied to the facts at hand, the Eighth Circuit Court of Appeals erred in affirming the District Court's granting of summary judgment. Respondent Kruse, by initiating a reckless car chase in an unmarked vehicle without his assistance being requested clearly personifies a deliberate indifference to the safety of private individuals. Additionally, Respondent Kruse's culpability is compounded by the fact that he was violating Arkansas statutes by improperly using the center turning lane and operating an emergency vehicle without using his emergency siren while in pursuit of a misdemeanor traffic offender outside his

jurisdiction. It's clear that Windham has stated genuine issues of significant material facts and this case should be properly heard at a trial on the merits.

II. Review Is Warranted Because The Court Of Appeals For The Eighth Circuit Erred, As A Matter Of Law, When It Held That Windham's Substantive Due Process Rights Were Not Violated By Respondents' Conduct Where The Law Is Not Clear As To The Level Of Culpability Necessary To Sustain A Substantive Due Process Rights Violation And Where A Reasonable Officer Would Have Known That He Was Violating Clearly Established Law.

The Court of Appeals for the Eighth Circuit has refused the invitation to set forth a minimum level of culpability necessary to sustain a section 1983 claim for denial of substantive due process. The Eighth Circuit has only indicated that gross negligence does not implicate the due process clause. See Meyers v. Morris, 810 F.2d 1437, 1468 (8th Cir.), cert. denied, 484 U.S. 828 (1987). Yet, Respondents' conduct in this case certainly rises even to the level of "shocks the conscience." Respondent Kruse readily admits that he was working for the City of Lowell at the time

of the accident, thereby acting under "color of state law." It is also undisputed that Respondent Kruse was never requested to assist in the pursuit. Further, Respondent Kruse was in plain clothes, driving an unmarked police vehicle without any roof mounted emergency lights or other highly visible markings. While most unmarked emergency vehicles have flashing or rotating lights mounted inside the front, the vehicle Respondent Kruse was driving was only equipped with a "12 inch long bar" containing two strobe lights. Each strobe was approximately 2 7/8 inches high and 4 inches wide. Whether Respondent Kruse was operating an emergency vehicle without adequate emergency lighting is one of genuine material fact that certainly could, along with Windham's other allegations, lead a reasonable person to conclude that Respondent Kruse's actions the day of the collision with Windham rose to the level of "shocking to the conscience."

Arkansas Code Annotated § 12-75-113(d) provides that when responding to an emergency, the designated

emergency vehicle shall have flashing lights or rotating beacon activated and must be equipped with and operating a siren device. Four witnesses state that Respondent Kruse was driving without his siren in operation immediately before the accident. One witness approached Respondent Kruse's vehicle immediately after the accident to render aid to Respondent Kruse and did not hear the siren in operation at that time either. Accordingly, it is a disputed and highly material fact whether Respondent Kruse had his siren in operation at the time his vehicle struck Windham. The fact, if proven, that a seasoned, experienced law enforcement officer was operating his emergency vehicle in violation of state law during a high-speed pursuit, thereby endangering bystanders, is a genuine material fact that could lead a reasonable person to believe that Respondent Kruse's actions the day of the accident rose to the level of "shocking to the conscience."

Moreover, an expert concluded that Respondent Kruse was traveling in a posted 50 miles-per-hour speed

zone at a rate of speed of not less than 75 miles-per-hour and was operating his vehicle in an extremely unsafe and reckless manner with no consideration of the risk he was creating. Highway 71B near the point of the impact is "hilly" and Respondent Kruse's view was partially obstructed, limiting the time Respondent Kruse could have seen Windham's vehicle before colliding with it. When asked if the reason why he did not see Windham was because he had entered the center lane before he went over the crest of the hill, Respondent Kruse stated, "I really don't know. I'm not going to rule it out." The manner in which Respondent Kruse was operating his vehicle the day of the collision with Windham was in violation of Arkansas Code Annotated § 27-51-104(a), which provides:

> It shall be unlawful for any person to drive or operate any vehicle in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise, or in such a manner as to evidence a failure to maintain proper control on the public thoroughfares or private property in the State of Arkansas.

As illustrated above by Respondent Kruse's own admission, it is a genuine issue of material fact whether Respondent Kruse was keeping a proper lookout for other traffic, another factor that could lead a reasonable person to conclude that Respondent Kruse's conduct the day of the collision was "shocking to the conscience."

Windham had come to a complete stop in the center turning lane before being struck by Respondent Kruse. Respondent Kruse was swerving in and out of the center turning lane at high speeds immediately before the head-on collision with Windham in order to pass vehicles that were blocking the two northbound and the two southbound lanes. Arkansas Code Annotated § 27-51-104(b) provides:

> It shall be unlawful for any person to operate or drive any vehicle on the public thoroughfares or private property in the State of Arkansas in violation of the following prohibited acts: (1) Improper or unsafe lane changes on public roadways.

Highway 71B is certainly a "public roadway" and the fact, by itself, that Respondent Kruse struck a non-moving vehicle in the center lane of 71B, could lead a reasonable

person to conclude that Respondent Kruse was violating the above statute and ultimately, along with other facts alleged by Windham, that Respondent Kruse's actions were "shocking to the conscience."

Finally, Respondent Kruse was not within his jurisdiction at the time of the crash and was fully aware that the Springdale Police Department had taken over the pursuit once Mey entered into Springdale. Ironically, Respondent Kruse at one point had decided to "discontinue" his pursuit, but later changed his mind again and renewed the chase. The need for a police officer to travel at reckless speeds **outside** his jurisdictional limits in pursuit of a misdemeanor offender is a disputed material issue of fact that should be decided by a jury.

The Eighth Circuit Court of Appeals did give some guidance as to criteria it would look for to sustain a § 1983 claim against a police officer. In finding that a woman who was evicted from her home by the Sioux Falls Police Department did not violate her due process rights, the court

noted that no physical force was used and that the plaintiff had failed to produce facts showing the police had acted oppressively or maliciously. Reese v. Kennedy, 865 F.2d 186 (8th Cir. 1989). Windham would argue that implicitly Reese stands for the proposition that where a police officer's actions were oppressive, malicious and involved physical force, the Eighth Circuit will find the facts sufficient to state a § 1983 claim.

The Fifth Circuit has also found that a police officer's conduct rises to the level of a constitutional violation when the officer terrorizes an individual in a malicious manner. Checki v. Webb, 785 F.2d 534 (5th Cir.1986). In Checki, the Fifth Circuit ruled that where a police officer uses a police vehicle to terrorize a civilian, and has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the constitutional line.

Furthermore, the Ninth Circuit Court of Appeals has found that the "shocking to the conscience" standard was met

where a prison guard attacked a prisoner and the attack was "unjustified and unprovoked. " Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th Cir. 1986).

Drawing from these cases, the criteria courts have used to find conduct that is "shocking to the conscience" involves actions by the police that are oppressive, where the use of physical force was to the extent to offend the senses, where there is malicious abuse of official power or where the actions of the law enforcement officer are "unjustified and unprovoked." Respondent Kruse's actions in the instant case were certainly oppressive, unjustified, unprovoked and the undisputed fact that Windham spent a month in the hospital and has over $120,000.00 in medical damages is clear evidence that Respondent Kruse's actions were manifestly brutal and physical.

III. Review Is Warranted Because This Court Has Recently Recognized The Existing Conflict Between The Circuit Courts Regarding The Level Of Culpability Necessary To Sustain A Substantive Due Process Rights Violation In A Police Pursuit Case.

In recognizing the need to resolve the existing conflict between the Circuit Courts regarding the level of culpability necessary to sustain a substantive due process rights violation in a police pursuit case, this Court accepted a Writ of Certiorari in the case of, Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996).

In Lewis, a police officer was involved in the high speed pursuit of a motorcycle. The chase ended when the motorcycle skidded sideways to a stop in the middle of the road and the officer, unable to stop his vehicle in time, crashed into the motorcycle resulting in the death of Lewis. The questions presented for review in Lewis were substantially similar to those presented in this Petition for a Writ of Certiorari.

Lewis was argued before this Court on December 9, 1997, but the opinion has not yet been released. Since Windham's case raises issues addressed in the Lewis case and since no opinion has yet been handed down, Windham would be prejudiced if her case was dismissed before the

results of the Lewis case are known. The issues in Windham's case may place her within the purview of newly created standards by this Court that would entitle Windham to have the opportunity to have her case heard on the merits.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this petition for writ of certiorari be granted.

DATED: March 24, 1998

Respectfully Submitted,

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 97-2479WA

Appeal from the United States District Court for
the Western District of Arkansas.

[UNPUBLISHED]

Carolyn Joyce Windham,	*
	*
Appellant,	*
	*
v.	*
	*
City of Lowell, Arkansas;	*
William James Kruse, police	*
officer, Individually and	*
in his official capacity,	*
	*
Appellees.	*

Submitted: December 23, 1997
Filed: January 5, 1998

Before FAGG, BOWMAN, and MURPHY, Circuit Judges.

PER CURIAM.

Carolyn Joyce Windham appeals the district court's adverse grant of summary judgment in her 42 U.S.C. § 1983 suit against the City of Lowell, Arkansas (City), and former police officer William James Kruse. Windham was seriously injured when a car driven by Kruse struck the vehicle Windham was driving. At the time of the collision, Kruse was attempting to join the high-speed pursuit of another vehicle. Windham brought this action contending Kruse violated her substantive due process rights by affirmatively placing her in a position of danger, and the City violated her rights by failing sufficiently to train its police officers about high-speed pursuits. The district court granted summary judgment to Kruse and the City, concluding Windham had failed as a matter of law to show a substantive due process violation. Windham appeals.

We review a grant of summary judgment de novo, and will affirm if the record, viewed in the light most favorable to Windham, shows there is no genuine issue of material fact, and the City and Kruse are entitled to judgment as a matter of law. See DeBord v. Board of Educ. of Ferguson-Florissant Sch. Dist., 126 F.3d 1102, 1104 (8th Cir. 1997).

While other circuits have set forth various formulations of the minimum level of culpability required to sustain a claim under section 1983 for a denial of substantive due process, we have declined to do so. See Gregory v. City of Rogers, 974 F.2d 1006, 1012 (8th Cir. 1992). We have held gross negligence does not implicate the due process clause. See Myers v. Morris, 810 F.2d 1437, 1468 (8th Cir.), cert. denied, 484 U.S. 828 (1987). After careful review of the record and the parties' briefs, and viewing the evidence in the light most favorable to Windham, we believe Kruse's actions fail as a matter of law to constitute a denial of

substantive due process. Cf. Roach of City of Frederickstown, 882 F.2d 294, 297 (8th Cir. 1989). In the absence of an underlying constitutional violation by Kruse, the City cannot be liable for inadequate training. See id. at 298.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CAROLYN JOYCE WINDHAM PLAINTIFF

v. Civil No. 96-5124

THE CITY OF LOWELL, ARKANSAS; WILLIAM JAMES KRUSE, POLICE OFFICER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY DEFENDANTS

SUMMARY JUDGMENT

On this 30th day of April, 1997, upon consideration of the defendants' motion for summary judgment, the court finds for the reasons stated in a memorandum opinion of even date that said motion should be and hereby is granted. This action is hereby dismissed.

IT IS SO ORDERED.

"s/ H. Franklin Waters".
United States District Judge

HFW/sg

U.S. DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FILED
MAY 01, 1997

CHRIS R. JOHNSON, CLERK
BY: "s/ Juns Oswland".
Deputy Clerk

This document entered on docket in compliance with Rule 58 and 79(a) FRCP.

on 5-1-97 by fr

U.S. DISTRICT COURT
WESTERN DIST ARKANSAS
FILED
MAY 01, 1997
CHRIS R. JOHNSON, CLERK

By "s/ June Oswland"
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CAROLYN JOYCE WINDHAM PLAINTIFF

v. Civil No. 96-5124

THE CITY OF LOWELL, ARKANSAS; WILLIAM JAMES KRUSE, POLICE OFFICER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY DEFENDANTS

MEMORANDUM OPINION

This case is currently before the court on the defendants' motion for summary judgment and plaintiff's response

thereto. Defendants contend that William Kruse's conduct, as alleged by plaintiff, fails to establish a constitutional violation and that this case must be dismissed. The case is scheduled for trial during the week of May 12, 1997.

Background.

This case concerns a head-on automobile accident which occurred on April 13, 1995, between an unmarked police car being driven by William Kruse (Kruse) and a vehicle driven by Carolyn Joyce Windham (Windham). On the date in question, Kruse was one of three police officers working for the City of Lowell, Arkansas--two of whom were on duty on the date and time at issue. Kruse was at the police department working on warrants.

The Lowell Chief of Police David Harmon (Harmon) was on patrol. At about 2:00 p.m. Harmon clocked a vehicle being driven by Keith Mey on radar traveling

southbound on Highway 71B at 76 miles an hour in a 45 mile per hour zone. Harmon pulled behind Mey and activated his lights. Mey accelerated apparently in an attempt to escape. At 2:04 p.m., Harmon radioed a description of the vehicle and its license number to the police dispatcher and indicated he was in pursuit. The license number was not registered to the vehicle being driven by Mey. At no time did Harmon request backup from Kruse.

Kruse heard the radio transmission, ran to his police car, and drove to assist Harmon. Kruse states he immediately activated his lights and sirens. The lights on the unmarked vehicle consisted of "two strobe lights hanging from the right visor, and also the headlights were on a wig-wag flash mode, alternating flashing headlights . . . and four [strobe lights] in the rear shelf." *Kruse deposition at* 25-26. The

strobe lights in front were on a bar and were in a 12" to 18" long bar mounted inside the front windshield. Plaintiff contends, and supports the contention with affidavits of four witnesses to the accident, that Kruse did not have his siren on.

At about this same time, Windham was turning right onto Highway 71B from Randall Road in Springdale. As she entered Highway 71B, Harmon passed by with his lights and siren in pursuit of Mey. Windham then traveled north a short distance and when she got towards the top of the hill[1] she entered the center turn lane in preparation for a left turn onto Wagon Wheel Road. Windham came to a complete stop in the center turn lane. *Windham deposition*

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[1] Plaintiff has submitted as an exhibit a letter from a collision consultant which states "the area of this accident would be described as 'hilly' with a grade of approximately 2 degrees on an incline toward the north for approximately 900 feet north to

at 12.

As Windham was traveling north, Kruse was traveling south to assist Harmon. The traffic was quite heavy, occupying all four lanes of the road, and Kruse came upon traffic in both south bound lanes that did not yield. Kruse, who was traveling at a speed in excess of the posted speed, used the center lane on two or three occasions to pass unyielding traffic. *Kruse deposition at* 15. At some point Kruse heard radio traffic indicating that the Mey vehicle had turned off of Highway 71B and he started to discontinue his response, however he continued his response when he heard the Mey vehicle was coming back onto the highway. *Kruse deposition at* 21.

When Kruse was in the area of Wagon Wheel Road he again pulled into the center lane to pass the vehicles and

---

the hillcrest."

almost immediately hit Windham's vehicle head on. When he entered the center turn lane, Kruse was going about 55 miles per hour (m.p.h.). *Kruse deposition* at 28. He then accelerating to a rate of speed estimated, by reference to the skid marks, to be approximately 71 miles per hour. *Kruse deposition at* 20 & 27-28. When he saw the Windham vehicle he began braking and left 183 feet of skid marks. *Id.* at 27. The accident report estimates Kruse's speed at the point of impact as 35 miles per hour.[2] The location of the accident was inside the city limits of Springdale.

Kruse reported the accident to radio dispatch at 2:09 p.m. Windham sustained injuries and was taken to the hospital where she remained for treatment from April 13,

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[2] Plaintiff has submitted six affidavits of witnesses who state the Kruse vehicle was travelling in excess of 55, 60, or 65 miles per hour immediately before colliding with plaintiff's vehicle.

1995, to May 12, 1995, incurring approximately $120,000 in medical bills. At the time of the accident, the City of Lowell had no written procedures concerning police pursuits or providing backup or assistance during police pursuits.

Windham has had a "collision consultant" investigate the accident. It is the opinion of the "collision consultant" that "Kruse was operating his vehicle in an extremely unsafe and reckless manner, with apparently no consideration for the risk he was creating to himself or other motorists on this crowded stretch of Highway 71B." Given the facts that Kruse was responding to "catch up" to a pursuit of a traffic violator who had already entered the Springdale city limits and Harmon was being assisted by Springdale police, the expert concluded there was no justification for Kruse to be operating in such a manner.

On August 7, 1996, Windham filed this action contending that Kruse's actions on the day of the accident, along with the failure of the City of Lowell to adequately train Kruse, had resulted in a violation of her Fourteenth Amendment substantive due process rights.

Summary Judgment Standard.

Rule 56(c) provides that summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

In determining whether there are any genuine issues of material fact, the court must first give the nonmoving party "the benefit of the reasonable inferences that can be drawn from the underlying facts." *Fischer v. NWA, Inc.*, 883 F.2d

594, 598 (8th Cir. 1989), *citing, Trnka v. Elanco Prod. Co.*, 709 F.2d 1223 (8th Cir. 1983), *cert. denied*, 495 U.S. 947 (1990). The court may then grant the motion for summary judgment only "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Discussion.

Defendants have moved for summary judgment contending that under the standard adopted by this court in *Parton v. Bentonville*, 901 F. Supp. 1440 (W.D. Ark. 1995) the plaintiff cannot as a matter of law establish the requisite level of culpability for a due process violation. Defendants contend the applicable standard is the "shocks the conscience standard" and that the facts of this case amount, at most, to negligent conduct.

In opposition, plaintiff contends Kruse, in causing her injuries, acted oppressively, maliciously, and used such brutal force so as to offend even hardened senses. Further, plaintiff contends Kruse's actions were a direct result of inadequate or improper training by the City of Lowell. She argues that the City's failure to adopt automobile pursuit polices and to properly train its officers in this regard constitutes conduct which is shocking to the conscience and resulted in a violation of her civil rights.

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Eighth Circuit has held that the Due Process Clause is violated when the state fails to protect the life, liberty or security of individual citizens in only two situations: "first, in custodial and other settings in which the state has limited the

individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992). Plaintiff makes no contention that she was in a custodial setting; rather, she contends that Kruse placed her in a dangerous situation she would not have otherwise faced.

The level of culpability necessary to sustain a due process violation has not yet been determined by either the Supreme Court or the Eighth Circuit. However in *Parton*, this court adopted the "shock the conscience" standard.

Specifically, we held:

> [I]n a state-created danger case, the state actor is not liable every time he affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. Rather, the state actor must place the individual in danger with conduct that is culpable to some degree. As to the

required showing of culpability, it is clear that more than mere negligence is required to prevail on a due process claim. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). It is also clear that more than "gross negligence" is required. *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987). However, the exact level of culpability that is required to prevail on a due process claim has not been settled in this circuit. In fact, the Eighth Circuit expressly refused to decide that question in *Gregory*, 974 F.2d at 1012 ("we need not consider . . . what greater standard of care is necessary to state a substantive due process claim under section 1983").[3]

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[3] As we noted in *Parton*, in at least two post-*Gregory* cases, the Eighth Circuit has not taken the opportunity to clarify the proper standard. In *Sellers v. Baer*, 28 F.3d 895 (8th Cir. 1994), the court assumed that a state-created danger resulting from "recklessness" would state a due process claim, but held that no reasonable fact-finder could find reckless conduct. In *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), the court assumed that a state-created danger that "shocks the conscience" states a due process claim, but held that the allegations in the complaint did not rise to that level.

> As the Eighth Circuit has not determined the precise level of culpability that must be shown to prevail on a substantive due process claim, this court now holds that, where innocent civilians are injured in a car accident caused by a high speed police chase, or by any other state actor who is acting in the line of duty and in contravention of the rules of the road, the injured civilian states a due process claim only if the alleged misconduct "shocks the conscience."

Parton, 901 F. Supp. at 1442-1443. *See also Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996). In *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 720 (4th Cir. 1991) the court noted that the applicable question was whether the officer's conduct "so shocks the conscience as to constitute an abuse of governmental power violative of [the plaintiff's] constitutional liberty interests despite the existence of state tort laws under which that conduct is otherwise clearly actionable." *Id.* at 720.

As the *Evans* court noted, the "shocks the conscience" test is "particularly appropriate to measure police pursuits."

Evans, 100 F.3d at 1038.

> Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans, 100 F.3d at 1038.

Plaintiff contends Kruse's actions satisfy this standard. We are asked to consider, *inter alia*, the following facts: (1) Kruse's assistance was never requested; (2) Kruse was in plain clothes and driving an unmarked police vehicle without any roof mounted emergency lights or other highly visible markings; (3) the vehicle was only equipped with a 12" bar containing two strobe lights; (4) four witnesses state Kruse was driving without his siren immediately

before the accident; (5) Kruse violated Ark. Code Ann. § 12-75-113 by operating an emergency vehicle in excess of the posted speed limit without an equipped and operating siren device; (6) Kruse operated his vehicle in a 50 mile per hour zone during a period of congested traffic at an extremely high rate of speed, estimated by witnesses to be from 60 to 75 miles per hour; (7) Kruse's view was partially obstructed by the crest of the hill; (8) Kruse was outside his jurisdiction at the time of the crash and was aware that the Springdale Police Department had become involved in the pursuit; (9) Kruse never came within sight of the Mey vehicle; and (10) the City of Lowell had no specific policy regarding the use of the center lane in emergency pursuits.

Having stated the applicable standard, the question is whether the evidence presented, taken in the light most favorable to Windham's case, satisfies "the shock the

conscience" test. In other police pursuit cases, courts have considered such factors as the duration of the chase, the distance the chase covered, the speed of the vehicles, whether the officers had good cause to believe a crime had been committed, the nature of the violation, the hazard created by the high speed chase, the time of day, the volume, type, and speed of the traffic in the area, the nature of the area and whether it was residential, commercial, etc., the road conditions, whether the officers were familiar with the area, and whether alternatives to hot pursuit were considered.

While each case necessarily turns on an analysis of the particular circumstances involved, a comparison of the facts present here to the facts present in other cases were the officers' behavior has been held not to shock the conscience is helpful. *Evans*, 100 F.3d at 1038.

In *Evans* the officers observed suspicious activity and attempted to stop the automobile and detain its occupants. Instead of stopping, the suspects accelerated and the officers observed the occupants placing items in their mouths and passing a jug back and forth. The officers concluded the suspects were swallowing potential evidence. The pursuit continued for approximately two minutes, covered about one-half mile, and the cars never exceeded 50 m.p.h.

The suspects' car struck a ten year old girl. Plaintiffs presented evidence that traffic was heavy at the time of the chase and numerous pedestrians were about. The officers were familiar with the area and knew it was a busy shopping venue adjacent to a densely populated residential area. They also knew there was limited visibility at the intersection in which the pedestrian was struck. The court

held the evidence did not satisfy the "shock the conscience" test.

In *Fagan v. Vineland*, 22 F.3d 1296 (3d Cir. 1994) an officer attempted to pull a car over to warn the driver about allowing his passenger to stand through the T-top of a Camaro. Unknown to the officer was the fact that the driver had been drinking. The Camaro attempted to evade the officer and the officer pursued the vehicle through a residential neighborhood where various stop signs were run. The speed of the chase increased until the Camaro was going 70 to 80 and the officer was going 50 to 60. At a busy intersection, the Camaro ran a red light and broadsided a pickup. The occupants of the truck were killed. The court held the facts were insufficient to create a genuine issue of material fact as to whether the conduct of the police shocked the conscience.

In *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991) an officer chased a vehicle after he observed it spinning its wheels as it left a gas station. While the chase was in progress, the officer received a report that $17 worth of gas had been stolen. The chase was along a narrow, two-lane highway traversing an area of varying population at speeds ranging from 65 to 105 miles per hour. At the time of the chase a carnival was in the area and cars were parked along both sides of the road. At some point, the suspect's vehicle failed to negotiate a curve, crossed the center line, and struck a car being driven by Sharon Temkin. When the officer attempted to brake, he lost control and his vehicle also struck Timkin's car. The court held the officer's conduct did not shock its judicial conscience and did not constitute a violation of substantive due process.

On the facts as presented in this case, we conclude that Kruse's conduct does not rise to the requisite standard of culpability. Certainly one might believe that Kruse failed to exercise proper judgment, that his conduct was unreasonable under the circumstances especially when other vehicles were already in pursuit and there was no request for backup, or that he was grossly negligent or recklessly indifferent. However, we cannot say that the facts or circumstances are such that a genuine issue of material fact is raised with respect to whether his conduct meets the applicable culpability standard.

Conclusion.

For the reasons stated the defendants' motion for summary judgment will be granted by a separate order entered concurrently herewith.

Dated: April 30,1997

"s/ H. Franklin Waters".
United States District Judge

HFW/sg

(8)

Supreme Court, U.S.
FILED
MAY 6 1998
CLERK

No. 97-1631

In The

Supreme Court of the United States

October Term, 1997

CAROLYN JOYCE WINDHAM,

Petitioner,

vs.

THE CITY OF LOWELL, ARKANSAS; WILLIAM JAMES KRUSE, police officer, Individually and in his Official Capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Eighth Circuit Court of Appeals' finding that petitioner failed to allege sufficient facts upon which to base her claim of a substantive due process violation?

PARTIES TO THE PROCEEDING

The petition correctly identifies all parties to the proceeding.

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STATEMENT OF THE CASE

William Kruse, a respondent in this case, was first certified as a police officer in 1981. On the afternoon of April 13, 1995, there were two police officers on duty in the City of Lowell, Arkansas. The first, Chief of Police David Harmon, was on patrol. The second, Kruse, was at the police station.

At approximately 2:04 p.m. the Benton County Police dispatcher reported an automobile theft in the City of Lowell. Immediately thereafter, also at 2:04 p.m., Chief Harmon clocked a vehicle on radar traveling southbound on Highway 71B at 76 miles an hour in a 45-mile-per-hour zone. Keith Allen Mey was the driver of the speeding vehicle.

Harmon pulled behind Mey and activated his flashing blue lights. Mey accelerated in an attempt to escape. At 2:05 p.m. Harmon radioed a description of the Mey vehicle and its license plate number to the police dispatcher and indicated that he was in pursuit. The license tag on the Mey vehicle was not registered to the vehicle that Mey was driving.

Respondent Kruse heard the radio traffic between Harmon and the dispatcher. From the 2:04 p.m. call regarding a stolen car, and Harmon's 2:04 p.m. report that he was in pursuit, along with the fact that Mey's license plate was not registered to the vehicle that he was driving, Kruse believed that Harmon was in pursuit of a stolen car. He immediately ran to his police car, turned on his lights and siren, and drove to assist Harmon. Chief Harmon testified that Kruse left the police station to help him because police officers in a small city, without designated backup, rely on the nearest officer for assistance.

As the police officers were pursuing Mey, Carolyn Windham was preparing to turn right onto Highway 71B from

an adjoining street in Springdale, Arkansas, which is a neighboring City to the City of Lowell. Her granddaughter, a passenger in her vehicle, saw the Mey vehicle traveling south and told the petitioner that a "crazy" person had turned on a cross street at a high rate of speed. Then, as the petitioner attempted to enter Highway 71B, which runs into the City of Lowell, she hit her brakes as Chief Harmon passed her with his lights and siren activated in pursuit of Mey. Windham then traveled north on Highway 71B for a short distance and entered the center turn lane in preparation for a left turn onto Wagon Wheel Road, which intersects Highway 71B.

As Windham was traveling north on Highway 71B, Officer Kruse was traveling south, on the same highway, behind Harmon. Officer Kruse, with the flashing lights and siren activated on his police car, came upon traffic in both south bound lanes in the area of Wagon Wheel Road that did not yield to his police vehicle. He pulled into the center turn lane to pass the unyielding vehicles and made almost immediate contact with the petitioner's vehicle. The center turn lane on Highway 71B runs unimpeded and straight for the entire path of the pursuit. Kruse's estimated speed at impact was 35-miles-per-hour. Kruse reported the accident in a radio dispatch at 2:10 p.m.

At 2:11 p.m., Chief Harmon learned that the City of Springdale had three police cars ahead of him prepared to pursue Mey, so he radioed that he was "backing off". He then stayed back and allowed the Springdale Police Department to command the pursuit. Mey ran a roadblock, but was eventually apprehended by police officers from Springdale, and Harmon, at a second road block. Mey was charged with possession of a controlled substance, driving under the influence of a controlled substance, vehicular flight from a police officer (by both police departments), fictitious vehicle license, reckless driving,

speeding, and driving without a license. The Lowell Police officers were in charge of Mey's pursuit for approximately seven minutes, from the moment that Chief Harmon clocked Mey on radar until he turned over the pursuit to the neighboring city of Springdale. The radio log shows that Officer Kruse was only involved in the pursuit for approximately two minutes.

The Kruse-Windham accident was investigated by the Arkansas State Police. The point of impact of the two vehicles was 67 feet south of the Wagon Wheel Road intersection. Wagon Wheel Road is the street onto which Windham was preparing to turn. Both Kruse and Windham were injured in the accident and transported directly to the hospital.

Windham acknowledged that Officer Kruse did not intentionally try to stop her or injure her in the collision. Windham stated that the collision was a result of "a misconception on both parts", and when asked what caused the wreck, she said, "I just think it was a chain of events that took place in everyday life." It is therefore undisputed that the collision was accidental.

Windham first filed suit against her uninsured motorist carrier, American National Insurance Company, claiming that Mey's actions caused her injuries. Windham later initiated this suit against the City of Lowell and William Kruse for violating her Fourteenth Amendment right of due process. The District Court found as a matter of law that "[t]he level of culpability of the defendants simply is not sufficient to turn this state tort action into a federal case."

The Eighth Circuit affirmed the District Court's holding. The Eighth Circuit noted that "gross negligence" does not implicate the due process clause, and it stated that "Kruse's actions fail as a matter of law to constitute a denial of substantive due process."

A. The petition omits relevant state statutes.

Petitioner makes reference only to the general "rules of the road" which all civilian drivers are required to follow in support of her argument that respondents violated her civil rights. She fails to acknowledge the statutes that allow emergency vehicles, such as respondents' police car, to contravene the general rules of the road. Emergency vehicles are allowed to proceed through red lights and stop signs, and they are allowed to exceed speed limits. Ark. Code Ann. § 27-49-109; Ark. Code Ann. § 27-51-202. Also, under Arkansas law, civilian drivers have a duty to yield the right-of-way to an approaching emergency vehicle that has engaged its flashing lights and/or siren. Ark. Code Ann. § 27-51-901. These state statues are relevant to determine the level of Officer Kruse's culpability.

B. The petition misrepresents facts.

The petition incorrectly states that Kruse drove to assist Harmon *and* Bowman. However, the record below shows that Bowman was not involved in the pursuit when Kruse left to assist Harmon. Bowman was at a meeting in Springdale, Arkansas and happened to hear on the radio that the pursuit was headed his direction, which means that Kruse was the only City of Lowell officer available to assist Harmon. When Kruse left the station to help Harmon, he did not know if the Springdale Police had joined the pursuit to aid Harmon. Bowman reported that he was available for the pursuit at 2:12 p.m. and was advised by Chief Harmon to check on Kruse instead.

The petition also misrepresents the pursuit as "strictly misdemeanor". However, the record demonstrates that Kruse believed that the suspect may have been driving a stolen car.

C. Respondents object to consideration of any statements made by petitioner's "accident reconstructionist".

Petitioner makes reference to legal and factual conclusions attributed to an "accident reconstructionist". This "expert witness" merely provided an unsworn letter stating his opinions, after Kruse and the City of Lowell requested summary judgment at the District Court level. He was not qualified as an expert under Rule 702, FRE. There is no support for Windham's claim that he was qualified to testify about police pursuits, use of police vehicles, etc., which are not necessarily subjects of common knowledge. His letter claims to be based on a "preliminary investigation", with no indication as to his methods used, his source of facts, or materials. There is nothing in his letter to prove that he is competent to testify to the opinions stated, so his testimony was not admissible, as required by Rule 56, FRCP for consideration by the court. Nor was his "testimony" submitted by sworn affidavit as required by Rule 56(e), FRCP. Since he was not qualified as an expert, and he did not submit sworn, admissible testimony, all of his statements must be excluded from consideration.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER FAILED TO STATE SUFFICIENT FACTS TO SUPPORT A FEDERAL CAUSE OF ACTION.

This case was determined based on the facts as alleged by the petitioner. The courts below properly stated the rule of law governing the case and there is no compelling reason for this Court to review the circuit court's decision.

While the Eighth Circuit has not stated the exact level of culpability that is required of a state actor in order to support a due process claim brought under 42 U.S.C. § 1983 in a police pursuit case, it is clear that more than "gross negligence" is necessary. *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir. 1987), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987). The District Court for the Western District of Arkansas, following the lead of several circuits, determined below that the "shocks the conscience" standard is the appropriate measure in these cases. *Citing Parton v. City of Bentonville*, 901 F. Supp. 1440, 1443-44 (W.D. Ark. 1995). (*See also Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994); *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991); *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996)).

Petitioner argues that the District Court and the Eighth Circuit should have applied the "deliberate indifference" standard. However, petitioner fails to show that the application of such a standard would have allowed her case to proceed to trial based on these facts. The courts below found that the facts alleged by Petitioner merely supported a claim for negligence or gross negligence on the part of respondent Kruse. Petitioner does not ask this Court to determine that negligence or gross negligence are sufficient to support a claim for a due process violation, and therefore there is no reason for this Court to review the lower court's decision.

The Eight Circuit's decision in this case is not in conflict with the decision of the other federal circuits. In this case, the Eighth Circuit declined to articulate what level of culpability is required to support a due process claim in a police chase case and simply stated that gross negligence is insufficient, which is consistent with the decisions from the other circuits.

The First Circuit Court noted in *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), that the "shocks the conscience" test, which

requires a higher level of culpability than "gross negligence", is particularly appropriate to measure police pursuits". *Id.* at 1038. The First Circuit based its decision on the need to allow law enforcement officers to perform their jobs.

> Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and the risk of injury to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans, 100 F.3d at 1038.

In adopting the "shocks the conscience" standard, the District Court in this case relied in part on this Court's unwillingness to allow the due process clause to become a tort law "to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976). It also looked to the Eighth Circuit's refusal to expand constitutional tort liability in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993). Even if Petitioner terms the police negligence as "reckless and wanton", she is still bringing an action for tort. *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1446-47, n.3 (10th Cir. 1990).

The conduct alleged in this case falls short of the "gross negligence" standard, for a police officer, let alone the "shocks the conscience" test. William Kruse did not do anything

"shocking" in this case. He was the only officer available to assist Chief Harmon. Police officers in a small city must rely on the nearest fellow officer for assistance. The police dispatcher reported a stolen vehicle just as Chief Harmon became involved in a pursuit with a suspect whose license plate did not match his vehicle who accelerated when Harmon attempted to make a stop.

The pursuit occurred during daylight, and Officer Kruse used his emergency lights and siren. When some vehicles failed to yield to Kruse's police car, as required by Arkansas law, he attempted to pass in a turn lane that is straight, and free of any medians or other obstructions. *See* Ark. Code Ann. § 27-51-901. Kruse's involvement in the pursuit lasted approximately two minutes. Chief Harmon turned over control of the pursuit to the City of Springdale police as soon as they were able to provide sufficient officers, which was after only seven minutes of involvement.

Even if Windham's allegations are assumed to be true, the complaint was properly dismissed because the alleged conduct on behalf of William Kruse is insufficient to support a due process claim under 42 U.S.C. § 1983. Windham merely alleged that Officer Kruse was "in route to join an ongoing pursuit . . ."; that in order to pass vehicles on the left, Officer Kruse entered the center turn lane; that due to a hill, Officer Kruse was unable to see that Windham's vehicle was stopped in the center turn lane waiting to make a left-hand turn; and that Officer Kruse was unable to avoid colliding with the Windham's vehicle due to traffic in all other lanes. Therefore, Windham alleged that Kruse was *negligent* or *reckless* in his decision to enter the center turn lane. None of Petitioner's allegations prove that a due process violation occurred.

Windham's allegations are less egregious than those from a multitude of police crash cases in which courts have found that

summary judgment for the officer was proper. In *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294 (8th Cir. 1989), a police officer attempted to stop a suspect driving a car with license plates that did not match the vehicle. The suspect fled and the officer pursued beyond his city's limits. While in pursuit, the police officer lost control of his vehicle and collided head-on with the plaintiff. The plaintiff in *Roach* claimed that the officer's conduct was sufficient to shock the conscience. The Eighth Circuit found that the officer's conduct did not even satisfy the gross negligence test and fell short of the level necessary to sustain a due process claim under § 1983. *Id.* at 297.

The plaintiff in *Temkin v. Frederick County Com'rs*, 945 F.2d 716 (4th Cir. 1991), brought suit for a due process violation after being struck by a suspect fleeing from the police. The suspect spun his wheels outside a gas station and then fled from the deputy who attempted to stop him. The deputy chased the suspect at night at speeds of over 105 miles per hour on a narrow two-lane road. The deputy continued the chase into an area in which a carnival was being held and cars were parked on both sides of the street. Both the suspect and the deputy eventually lost control of their vehicles and the deputy's car struck the plaintiff's at a speed of around 60 miles per hour. The Fourth Circuit affirmed summary judgment in favor of the defendants holding that the deputy's alleged conduct fell short of the "shocks the conscience" standard. *Id.* at 723.

The court in *Temkin* noted consistent decisions nationwide, such as *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Taylor*, a police officer responding to an emergency call in Georgia drove at 46 miles per hour in a 30-mile-per-hour zone. Under Georgia law, police vehicles were only allowed to exceed posted speed limits when responding to emergency calls if the officer used the vehicle's flashing lights and siren. The officer

in *Taylor* used neither, and his vehicle struck the plaintiff's as she passed through an intersection. The court found the officer's conduct insufficient to raise a fact issue on the plaintiff's due process claim. *Id.* at 950.

The defendant police officer in *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990), was assumed to have been driving at between 55-65 miles per hour around a blind curve in a 35-mile-per-hour-zone. He was not using his emergency lights or siren; it was after midnight; and it had been raining and sleeting. The officer's car collided with the plaintiff's, broadside, as she was leaving the parking lot of a restaurant. The court found these facts insufficient to support a federal cause of action. *Id.* at 1447. *See also Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987) [pursuit at 120-135 miles per hour in traffic did not constitute "gross negligence"].

When measured against the conduct alleged in *Roach, supra*; *Temkin, supra*; *Apodaca, supra*; *Sherrill, supra*; and *Taylor, supra,* it is apparent that Windham's allegations do not support a claim for a due process violation. Windham has merely stated a claim for negligence. Petitioner cannot find a case from *any* Circuit, applying *any* standard in which facts similar to those she alleged have been sufficient to support a due process violation.

Windham urges this Court to adopt the "deliberate indifference" test for culpability. As discussed above, the "shocks the conscience" standard is based on the realities of police work. *See Evans, supra.* In almost every case involving a pursuing police officer's crash with a bystander, the bystander can claim that the officer deliberately exceeded the speed limit or violated another traffic rule. Applying the "deliberate indifference" standard could easily make every act of driving negligence by a police officer a federal case, which makes the "shocks the conscience" test preferable in these cases.

Even if this Court adopts the deliberate indifference standard, the lower court's decision should stand. Petitioner defines the deliberate indifference standard as

> requiring a plaintiff to allege facts that, if proven, would show that the law enforcement officer acted with deliberate indifference if he knew of a risk that was so great that it was highly probable that harm would follow and he still proceeded with unreasonable disregard of the probable harm.

Citing Medina v. City and County of Denver, 960 F.2d 1493, 1496 (1992).

The problem with petitioner's argument that William Kruse was deliberately indifferent in this case is that Officer Kruse was also injured in the accident. By his alleged "oppressive use of force" he put himself in the hospital, an act which it defies logic to believe was "malicious" as argued by Windham. Her argument is also contrary to her own statement that the accident was unintended. In arguing that Kruse was deliberately indifferent, she is claiming that Kruse knew that it was highly probable that he would injure himself in the accident, but that he proceeded to act in a manner that would bring about that harm to himself as well as to Windham. There is no evidence that he knew that his injuries, or Windham's were highly probable; he was merely negligent.

William Kruse, as a law enforcement officer in the State of Arkansas, had the right to reasonably contravene the rules of the road in his pursuit of Mey. If he acted in a manner that was more reckless than a reasonable police officer would have acted, Windham's remedy lies in a state tort claim. *See City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989). The mere fact that a police officer may have been negligent does not somehow elevate the tort claim to a civil rights violation.

II.

ANY CONFLICT IN THE CIRCUIT COURTS DOES NOT ALTER THE OUTCOME OF THIS CASE.

This Court has already heard argument in the case of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir.1996), *cert. granted,* 1997. In deciding *Lewis*, this Court will have the opportunity to resolve any conflict between the standards currently being applied in the Circuit Courts. The outcome of *Lewis*, will not affect petitioner's claim however.

In *Lewis*, the Ninth Circuit acknowledged that "bare" gross negligence is never sufficient to sustain a § 1983 claim for a substantive due process violation. *Id.* at 440. It determined that a higher level of culpability was necessary based on this Court's holding in the case of *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Citing *City of Canton*, the Ninth Circuit in *Lewis* established the "deliberate indifference" standard in police chase cases. Based on the particular facts presented in *Lewis*, the court held that a fact question was presented as to whether or not the police conduct met that standard.

As the court noted in *Lewis*, no Federal Circuit Court has found that negligent conduct can form the basis of a § 1983 due process violation. *Id.* at 439, n.5. Petitioner does not urge this Court to decide that negligent conduct is a sufficient basis for such a claim. The courts below determined that the facts in this case only establish negligence. Therefore, petitioner's claim is insupportable under any standard either currently in use or proposed by any circuit court and there is no reason for this Court to review the decision below.

CONCLUSION

The lower courts dismissed this case based on the particular facts presented by Petitioner. The facts of this case do not support a due process claim under any of the current or proposed standards of culpability. This Court does not need to grant review of this case in order to resolve a conflict between the circuit courts. Therefore, there is no compelling reason for this Court to review this case and the petition for a writ of certiorari must be denied.

Respectfully submitted,

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